Nos. 82-1331 and 82-1352

In the Supreme Court of the United States

OCTOBER TERM, 1982

LOUISIANA PUBLIC SERVICE COMMISSION, PETITIONER
v.
FEDERAL COMMUNICATIONS COMMISSION, ET AL.

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, ET AL., PETITIONERS
v.
FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

WILLIAM F. BAXTER
Assistant Attorney General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BRUCE E. FEIN
General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

JOHN E. INGLE
Deputy Associate General Counsel

MICHAEL DEUEL SULLIVAN
Counsel

Federal Communications Commission
Washington, D.C. 20554

QUESTION PRESENTED

Whether the Federal Communications Commission, in adopting rules and policies requiring that customer premises telephone equipment which is used interchangeably for interstate and intrastate service shall no longer be subjected to tariff regulation, may preempt state regulation that would require continued tariffing of such equipment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-47)[1] is reported at 693 F.2d 198. The decisions of the FCC, known in the industry as the "*Computer II*" decisions, are reported at 77 F.C.C. 2d 384, 84 F.C.C. 2d 50 (1980), and 88 F.C.C. 2d 512 (1981)..

[1] "Pet. App." refers to the appendix to the petition in No. 82-1331.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 1982. The petition for a writ of certiorari in No. 82-1331 was filed on February 9, 1983, and the petition in No. 82-1352 was filed on February 10, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Sections 2, 203 and 221 of the Communications Act, 47 U.S.C. 152, 203 and 221, are set forth at Pet. App. A-48 to A-52.

STATEMENT

This case arises from an FCC rulemaking proceeding that made significant changes in the regulatory structure for interstate telecommunications and related data processing and computer activities. In its *Second Computer Inquiry*, or "*Computer II* "decision, the FCC determined that only "basic" interstate telecommunications common carrier services should continue to be subject to regulation under the tariff sections of Title II of the Communications Act, 47 U.S.C. 201-205. The Commission concluded that the provision of customer premises equipment for use in conjunction with interstate telecommunications services was not a common carrier service and should not be regulated pursuant to tariff as a common carrier service.[2] The Commission also declared that its determinations with respect to the regulation of interstate services and facilities preempted inconsistent or conflicting state regulation of these same

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[2]The Commission also concluded that "enhanced" services (*i.e.*, services that involve more than the pure transmission of messages) should not be subject to tariff regulation, and it adopted structural and accounting rules for the provision, without tariffs, of enhanced services and customer premises equipment. The ruling with respect to enhanced services and the structural and accounting rules are not before this Court.

activities. The court of appeals affirmed the FCC's decision in its entirety (Pet. App. A-1 to A-47).

1. Telephone companies traditionally have offered services and facilities to the public under tariffs or schedules showing the charges, classifications, practices, and regulations that govern the use of those services and facilities. As a general rule, the telephone companies have offered interstate and foreign services and facilities under tariffs filed with the FCC (47 U.S.C. 203), and have offered intrastate services and facilities under tariffs filed with state regulatory commissions. The Communications Act of 1934 reserves the regulation of purely intrastate service to the states while granting comprehensive regulatory authority over interstate and foreign communications to the FCC. 47 U.S.C. 151, 152, 153(a) and (e).

The scheme of complementary federal and state regulation results in some overlap in the case of equipment and facilities used for both interstate and intrastate communications, most notably terminal equipment (*i.e.*, telephones and other devices) connected to the end point of the telephone network. Conflicts between state and federal authorities were rare, however, until comparatively recently. Until the mid-1970s the FCC largely acquiesced in state tariff regulation of terminal equipment used for both interstate and local service. State commissions generally regulated terminal equipment as an adjunct to local exchange service, in the absence of any FCC assertion of a paramount federal policy. Most carrier offerings of terminal equipment thus were not subject to tariffs at the federal level.[3]

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[3]There were some exceptions to the Commission's policy of not subjecting terminal equipment to federal tariffs, as, for example, in the case of a particular kind of terminal equipment that was primarily for interstate communications. *E.g.*, *Department of Defense* v. *General Telephone Co.*, 38 F.C.C. 2d 803 (1973), aff'd mem., *sub nom. St. Joseph Telephone & Telegraph Co.* v. *FCC*, 505 F.2d 476 (D.C. Cir.

In more recent years, FCC policies with respect to services and facilities used for both interstate and intrastate communications sometimes have come into conflict with state regulatory policies. In several instances of conflict, the FCC has asserted federal primacy over state regulation. The courts uniformly have upheld the FCC's assertions of paramount federal authority.[4] In the particular case of terminal equipment used for both interstate and intrastate service, the Fourth Circuit on two occasions has affirmed the FCC's assertion of paramount jurisdiction to determine the terms and conditions for interconnection of the equipment to the network at the local exchange level. *North Carolina Utilities Commission* v. *FCC*, 537 F.2d 787, cert. denied, 429 U.S. 1027 (1976) (*NCUC I*); *North Carolina*

1974) (table). The FCC also undertook to regulate certain practices and restrictions governing the use of terminal equipment where a federal interest was present, even though the equipment was offered primarily under state tariffs. *E.g., Hush-A-Phone Corp.* v. *AT&T*, 22 F.C.C. 112 (1957), on remand from *Hush-A-Phone Corp.* v. *FCC*, 238 F.2d 266 (D.C. Cir. 1956). In addition, although federal tariffs generally did not set forth a discrete charge for terminal equipment, interstate ratepayers paid a part of the cost of that equipment as a result of the jurisdictional separations process. That process assigns to the federal jurisdiction a percentage of the cost of telephone company plant that is used indivisibly for interstate and intrastate calls. The assignment of part of this cost to the federal jurisdiction results in an addition to the charges ratepayers pay for interstate and foreign service. See *Smith* v. *Illinois Bell Telephone Co.*, 282 U.S. 133 (1930). The jurisdictional separations process has been incorporated in the FCC's rules. See *In re Separations Procedures*, 26 F.C.C. 2d 248 (joint board recommendation), adopted, 26 F.C.C. 2d 247 (1970).

[4] *E.g., New York Telephone Co.* v. *FCC*, 631 F.2d 1059 (2d Cir 1980); *California* v. *FCC*, 567 F.2d 84 (D.C. Cir. 1977), cert. denied, 434 U.S. 1010 (1978); *Puerto Rico Telephone Co.* v. *FCC*, 553 F.2d 694 (1st Cir. 1977); *North Carolina Utilities Commission* v. *FCC*, 552 F.2d 1036 (4th Cir.), cert. denied, 434 U.S. 874 (1977); *North Carolina Utilities Commission* v. *FCC*, 537 F.2d 787 (4th Cir.), cert. denied, 429 U.S. 1027 (1976). Cf. *New York State Commission on Cable Television* v. *FCC*, 669 F.2d 58 (2d Cir. 1982); *General Telephone Co.* v. *FCC*, 449 F.2d 846 (5th Cir. 1971).

Utilities Commission v. *FCC*, 552 F.2d 1036, cert. denied, 434 U.S. 874 (1977) (*NCUC II*).

2. In the *Second Computer Inquiry*, the Commission sought to adapt its regulatory policies to new and still developing conditions resulting from the convergence of telecommunications and data processing technologies and usage.[5] Under the policies announced in the *Computer II* decision, the FCC will continue to regulate "basic" telecommunications services under tariff.[6] "Enhanced" services[7] will not be subjected to tariff regulation.

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[5]The *First Computer Inquiry* was the FCC's initial effort to fashion policies to deal with this development. In that rulemaking, the FCC decided that its regulation in this field would turn on a distinction between communications services, which would be subject to common carrier regulation, and data processing services, which would not be subject to tariff regulation at all. Carriers could provide data processing services only through fully separated subsidiary corporations. *In re Computer Use of Communications Facilities*, 28 F.C.C. 2d 267 (1971), 34 F.C.C. 2d 557 (1972), aff'd in relevant part *sub nom. GTE Service Corp.* v. *FCC*, 474 F.2d 724 (2d Cir. 1973). The *Computer I* distinction required the FCC to make judgments in close cases as to whether particular "hybrid" services or facilities were communications or data processing services.

Technological developments soon resulted in "smart" terminal equipment with substantial data processing capabilities. It became increasingly difficult for the Commission to classify terminals as either communications or data processing under the 1971 rules. AT&T's proposal in 1975 to offer a sophisticated terminal device, the Dataspeed 40/4, persuaded the FCC of the need to revisit its rules governing common carrier offerings of data processing services. *In re AT&T (Dataspeed 40/4)*, 62 F.C.C. 2d 21 (1977), aff'd *sub nom. IBM Corp.* v. *FCC*, 570 F.2d 452 (2d Cir. 1978). See *In re Second Computer Inquiry*, 64 F.C.C. 2d 771 (1977).

[6]The FCC defined "basic" service as the offering of a "transmission pipeline" (84 F.C.C. 2d at 54), or "a pure transmission capability over a communication path that is virtually transparent in terms of its interaction with customer supplied information" (77 F.C.C. 2d at 420).

[7]"Enhanced" services are those which are "more than a basic transmission service" (77 F.C.C. 2d at 420). This includes most activities that would have been categorized as "hybrid" services under the 1971 rules.

With respect to terminal equipment, the FCC first considered whether to make a regulatory distinction between "basic" and "enhanced" terminals,[8] but it ultimately decided to treat all "customer premises equipment" (CPE) alike by removing all such equipment from tariff regulation. The Commission found that the provision of CPE, which was a competitive activity involving carriers as well as unregulated suppliers, should not be considered a common carrier service subject to tariff-type Title II regulation, and it refused to allow carriers to continue offering CPE under tariff as part of a basic communication service (77 F.C.C. 2d at 435-447). The Commission explained that CPE is readily severable from basic telecommunications transmission service, that there are multiple vendors for most types of terminals, and that tariff regulation might inhibit effective competition. In addition, the "bundled" offering of terminals with basic service under a single tariff might hide cross-subsidies (*id.* at 438-447). The FCC reserved the right to reimpose regulation, under its "ancillary" jurisdiction, on common carriers' offerings of CPE (as well as enhanced services) if that were necessary to protect monopoly service ratepayers (84 F.C.C. 2d at 109).

3. In its *Computer II* decision the Commission declared that its action preempted state regulation of both CPE and enhanced services to the extent that such regulation would be inconsistent with the new federal policies (84 F.C.C. 2d at 103-104; 88 F.C.C. 2d at 523-524, 541-542). Preemption was necessary because the same facilities are used for both interstate and intrastate communications (77 F.C.C. 2d at 455-457). The federal policy could not work unless CPE

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as well as other services dependent on, but different from, basic service (84 F.C.C. 2d at 54). Enhanced services and their regulation are not at issue in this Court.

[8] *In re Tentative Decision*, 72 F.C.C. 2d 358, 406-419 (1979).

(and enhanced services) were removed from tariff regulation at both federal and state levels (84 F.C.C. 2d at 103-104).[9]

4. The court of appeals affirmed (Pet. App. A-1 to A-47). The court first held that the FCC had acted reasonably and within its statutory authority in removing CPE and enhanced services from tariff regulation and subjecting them instead to its ancillary jurisdiction (*id.* at A-18 to A-33). The court then turned to the preemption question raised in the instant petitions.

The court of appeals recognized that the federal-state conflict arose because most CPE "is used interchangeably for both interstate and intrastate communication and has traditionally been subject to both state and federal regulation" (Pet. App. A-34). It agreed with the FCC that continued state tariffing of CPE would frustrate "the objectives of the *Computer II* scheme" (*id.* at A-35). The court noted that the "[c]ourts have consistently held that when state regulation of intrastate equipment or facilities would interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount and conflicting state regulations must necessarily yield to the federal scheme" (*ibid.*; footnotes omitted).

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[9]The jurisdictional separations procedures, under which the costs of CPE are allocated partly to the federal jurisdiction for ratemaking purposes (see note 3, *supra*), reinforced the need for a uniform policy. If carrier-provided, state-tariffed CPE were used for both interstate and intrastate calls, some part of the carrier investment in CPE might be allocated to the interstate jurisdiction, and interstate ratepayers might have to pay higher rates so as to provide a return on that part of the investment. This would frustrate the federal policy, enunciated in *Computer II*, of isolating CPE costs from the costs that monopoly service ratepayers cover in buying common carrier utility services.

The court of appeals observed that its decision was in accord with two leading Fourth Circuit cases that had upheld FCC preemption of "conflicting state regulations [that] would [have] impede[d] the Commission in its effort to fulfill its statutory duty" (Pet. App. A-37; see *id.* at A-36 to A-40, discussing *NCUC I* and *NCUC II*). The court rejected attempts to distinguish *NCUC I* and *II* on the ground that they did not involve preemption of state ratemaking. First, the court stated that the FCC in this case was not setting rates for intrastate communications but was exercising "its direct authority to determine the regulatory treatment of CPE used for interstate communications" (*id.* at A-38). Here, as in the *NCUC* cases, "conflicting state policy, meant to affect only intrastate use, would unavoidably affect the federal policy adversely" and must yield (*ibid.*). Second, the court said, the Communications Act itself "does not distinguish between authority over rates and authority over other aspects of communications" (*id.* at A-38 to A-39). Thus, "conflicting federal and state regulations regarding dual use CPE are no more acceptable under the Act when equipment rates are involved, as here, than when interconnection policies are involved, as in the *NCUC* cases" (*id.* at A-39).

The court of appeals also rejected arguments that the FCC could not preempt "by creating a vacuum of deregulation" (Pet. App. A-40). The court pointed out that although the FCC had discontinued Title II tariff regulation of CPE, "it has substituted a different, *affirmative* regulatory scheme through its ancillary jurisdiction" (*ibid.*; emphasis in original; footnote omitted). The court concluded that federal regulation " 'need not be heavy-handed' " in order to have a preemptive effect (*ibid.*, quoting *New York State Commission on Cable Television* v. *FCC*, 669 F.2d 58, 66 (2d Cir. 1982)).

Finally, the court of appeals declined to debate the wisdom of the FCC's policy as compared with policies some states might favor (Pet. App. A-40 to A-41). Its function on review, the court said, was to determine "whether the Commission had the statutory authority to adopt the policy it did and whether that policy is arbitrary or capricious or an abuse of discretion" (*id.* at A-41). Having concluded that the FCC acted within its authority and in a reasonable fashion, the court remarked: "our review of the wisdom of state preemption is at an end" (*ibid.*).

ARGUMENT

The FCC in this case ordered the "detariffing" of customer premises equipment used in interstate communications and declared that tariff-type regulation of that equipment by state commissions was preempted as conflicting with the federal policy. The detariffing decision—whose substantive validity is not directly challenged here—was within the Commission's statutory authority over interstate communications and was neither arbitrary nor capricious. Only last Term, in *Fidelity Federal Savings & Loan Association* v. *de la Cuesta*, No. 81-750 (June 28, 1982), this Court emphasized that conflicting state laws may be preempted by valid federal regulations. The decision of the court of appeals upholding the FCC's *Computer II* rules is consistent with this Court's decision in *Fidelity Federal*, does not conflict with the decisions of any other court of appeals, and does not warrant further review.

1. In *Fidelity Federal*, this Court addressed the question whether a federal agency may adopt regulations that have the effect of displacing state law, in the absence of a specific congressional declaration of an intention to preempt. The Court held that a federal agency, acting within the authority delegated to it by Congress, may adopt regulations that

"have no less pre-emptive effect than federal statutes" (slip op. 11).[10]

Relying on *United States* v. *Shimer*, 367 U.S. 374, 381-383 (1961), the Court in *Fidelity Federal* explained that an agency that has been granted the discretion to accommodate competing public interest considerations may adopt regulations preempting state law even if there is no evidence of a specific congressional intention to preempt. "A pre-emptive regulation's force does not depend on express congressional authorization to displace state law * * *." *Fidelity Federal, supra*, slip op. 11. On judicial review, therefore, the issue is not whether *Congress* intended to preempt state law, but whether the *agency*, in adopting regulations codifying its view of the public interest, intended to preempt state law, "and, if so, whether that action is within the scope of the [agency's] delegated authority." Slip op. 11-12.

In the present case, the FCC explicitly declared that its new rules and policies had the effect of preempting inconsistent state regulation (84 F.C.C. 2d at 103-104; 88 F.C.C. 2d at 523-524, 541-542). Accordingly, under *Fidelity Federal*, the proper focus of the reviewing court is on whether the Commission has the authority to adopt the policy at issue and whether that policy is arbitrary or capricious. The resolution of these issues by the court of appeals does not warrant review by this Court.[11] The decision below is in

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[10]See also *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 295-296 (1979) (footnotes omitted) ("It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the 'force and effect of law.' This doctrine is so well established that agency regulations implementing federal statutes have been held to pre-empt state law under the Supremacy Clause."); *Blum* v. *Bacon*, No. 81-770, (June 14, 1982), slip op. 13-14.

[11]Indeed, we note that the instant petitions do not directly challenge the lawfulness of the FCC's regulatory policy for CPE. They challenge only the preemptive effect of that policy. But by conceding, in effect, the

accord with the decisions of other courts of appeals that have considered the preemption issue in similar contexts and have concluded that the FCC has authority to regulate terminal equipment used for both interstate and intrastate communications.

The leading cases recognizing the FCC's authority over dual-use terminal equipment are the Fourth Circuit's decisions in *NCUC I* and *II*. In those cases, the Fourth Circuit correctly held that, because the FCC has plenary statutory authority over interstate telecommunications (see 47 U.S.C. 151, 152(a), 153(a) and (e), and 201-205), the reservation to the states of authority over purely intrastate service and facilities in 47 U.S.C. 152(b) is no obstacle to FCC preemption of inconsistent state regulation of terminal equipment that is used for *both* interstate and intrastate communications.[12]

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lawfulness of the FCC's substantive policy, petitioners inadvertently have undermined their preemption argument beyond restoration. As the court of appeals properly concluded (Pet. App. A-41), once it is determined that the FCC acted within its authority and reasonably in adopting its substantive policy, the inquiry into the preemption question is at an end. This analysis is consistent with this Court's holding in *Fidelity Federal* that preemption by agency action is effective if the agency meant to preempt and if its substantive action was within its delegated authority.

[12]The arguments of both petitioners (82-1331 Pet. 24; 82-1352 Pet. 11-16) to the effect that the FCC in *Computer II* extended the "*Shreveport* doctrine" (see *Houston, E. & W. T. Ry.* v. *United States*, 234 U.S. 342 (1914)) to telecommunications miss the point of preemption law. The FCC has not purported to regulate purely intrastate service, as the ICC did in the *Shreveport* case. Rather, the FCC has exercised its undisputed authority over interstate communications to adopt particular regulatory policies for terminal equipment used for interstate as well as intrastate telecommunications. Accordingly, both the Fourth Circuit, in the *NCUC* cases (see *NCUC I*, *supra*, 537 F.2d at 793; *NCUC II*, *supra*, 552 F.2d at 1047-1048), and the court of appeals below (Pet. App. A-37 to A-38 & n.99) properly rejected the *Shreveport* argument.

NCUC I, supra, 537 F.2d at 791, 793-795; *NCUC II, supra*, 552 F.2d at 1041-1042, 1045-1047.[13]

The State of Arkansas, *amicus curiae* in No. 82-1331, contends (Br. 6-7) that the Court should grant review to consider whether the FCC may preempt state law by "deregulating" and leaving a "regulatory vacuum." This contention is also answered by the decision in *Fidelity Federal*. There, the Federal Home Loan Bank Board had preempted state laws restricting "due-on-sale" clauses in loan instruments and instead had given financial institutions the option to include and enforce such clauses. This Court held that the fact that "the Board's regulation simply permits, but does not compel," the use of the clause does not make the conflict between federal and state policy any less real, because the enforcement of state laws forbidding the use of the clause would "deprive[ ] the lender of the 'flexibility' given it by the Board" (slip op. 12-13). Moreover, the Court concluded that the existence of state regulation in an area where the federal agency has decreed there should be none would place an obstacle in the way of the full implementation of the federal policy, resulting in a clear conflict between the federal and state regulatory schemes. Slip op. at 13-14, citing *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941), and *Franklin National Bank* v. *New York*, 347 U.S. 373, 378 (1954).

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[13]The *NCUC* cases also laid to rest the argument (see 82-1331 Pet. 24-25) that Congress, in 47 U.S.C. 221(b), intended to deprive the FCC of authority over terminal equipment used predominantly for intrastate communications. The Fourth Circuit held that this section was merely intended to permit state commissions to regulate local exchange telephone service in those few metropolitan areas that overlap state boundaries. *NCUC II, supra*, 552 F.2d at 1045; *NCUC I, supra*, 537 F.2d at 795 & n.11. The court of appeals in this case adopted the Fourth Circuit's reasoning with respect to Section 221(b) (Pet. App. A-39 to A-40).

Here, the FCC chose to exercise its ancillary jurisdiction and to allow the competitive market in terminal equipment to operate free from tariff regulation. As the court of appeals observed (Pet. App. A-40; footnotes omitted), there is "no critical distinction between preemption by Title II regulation and preemption by the exercise of ancillary jurisdiction. It is clear to us that the *Computer II* regulations embody a comprehensive federal regulatory scheme, including rules governing the marketing of CPE by common carriers."[14] Any state tariff regulation of CPE would clearly conflict with this federal regulatory scheme.[15]

2. The decision below does not conflict with the decision of any other court of appeals. Although the National Association of Regulatory Utility Commissioners (NARUC) contends (82-1352 Pet. 11-16) that the ruling below conflicts with the Fourth Circuit's *NCUC* cases, the court below actually followed *NCUC I* and *II* and relied upon them as "leading cases" with which its own decision was "in accord" (Pet. App. A-36 to A-40).[16]

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[14]The court of appeals correctly pointed out that federal regulation " 'need not be heavy-handed in order to preempt state regulation' " (Pet. App. A-40, quoting *New York State Commission on Cable Television* v. *FCC*, *supra*, 669 F.2d at 66. See also *Brookhaven Cable TV, Inc.* v. *Kelly*, 573 F.2d 765, 768 (2d Cir. 1968), cert. denied, 441 U.S. 904 (1979). Cf. *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 773-776 (1947).

[15]The importance to the states of their "traditional state prerogatives" (see Arkansas Amicus Br. 9) is not a relevant factor in determining whether the federal decision overrides state law. " 'The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.' " *Fidelity Federal*, *supra*, slip op. 11, quoting *Free* v. *Bland*, 369 U.S. 663, 666 (1962).

[16]Indeed, on the issue of the applicability of Section 221(b), the court below specifically rejected its own prior analysis of that statute and adopted the Fourth Circuit's "more sound interpretation" (Pet. App. A-39 to A-40).

NARUC, however, claims to see a conflict because the FCC rules at issue in the *NCUC* decisions did not explicitly and directly preempt state ratemaking. On this basis, NARUC erroneously characterizes the *NCUC* cases as having determined affirmatively that Congress "preserved ratemaking authority over such CPE with the States" (82-1352 Pet. 11). In fact, in both *NCUC* decisions the Fourth Circuit affirmed federal preemption of certain aspects of state tariff regulation of CPE.[17] Those decisions recognized that the states retained authority over local services and facilities that are "separable from and do not substantially affect the conduct or development of interstate communications." *NCUC I, supra,* 537 F.2d at 793. But the court held without reservation that the FCC has plenary authority over CPE that is used in interstate communications.[18]

In any event, as the court of appeals in this case pointed out (Pet. App. A-38), the FCC in *Computer II* did not purport to set rates for intrastate service or even for jointly

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[17]The FCC rules at issue in the *NCUC* cases preempted state tariff restrictions on the use of customer supplied CPE. Preemption of those tariff restrictions thus was a curb on state tariff regulation. Moreover, to the extent that the use of non-telephone company CPE became more widespread as a result of the federal rule and its preemptive effect, the FCC rules involved in *NCUC I* and *II* had at least a potential effect on the charges for local service, which are at the heart of the state ratemaking power. The dissenting judge in *NCUC I* made clear his understanding of the scope of the federal preemption effected there (537 F.2d at 799):

> As a practical matter, this assertion of federal primacy necessarily and directly affects the intrastate rates which may be charged, jurisdiction of which could not be more clearly reserved to the States.

[18]The decisions of the Fourth Circuit in the *NCUC* cases have been followed by the First, Second and District of Columbia Circuits. *Puerto Rico Telephone Co.* v. *FCC*, 553 F.2d 694 (1st Cir. 1977); *New York Telephone Co.* v. *FCC*, 631 F.2d 1059 (2d Cir. 1980); *California* v. *FCC*, 567 F.2d 84 (D.C. Cir. 1977), cert. denied, 434 U.S. 1010 (1978).

used CPE. To be sure, the Commission adopted policies regarding the regulation of such equipment and required its removal from tariffs. This surely may have an impact on state rate regulation, as did the actions affirmed in the *NCUC* cases. But the *Computer II* policy does not amount to a "Federal control of local telephone rates," as NARUC suggests (82-1352 Pet. 11). The states remain free to set rates for local telephone service. They may not include CPE as a part of that tariffed service, however, because the paramount federal policy requires otherwise.

NARUC nevertheless contends (82-1352 Pet. 11-12) that the *NCUC* cases permitted federal encroachment only on the states' regulation of interconnection, but left their ratemaking powers intact. The court below properly disposed of this contention (Pet. App. A-38 to A-39; footnote omitted; emphasis original):

> We fail to see any distinction * * * between preemption principles applicable to state ratemaking authority and those applicable to other state powers. The operative principle in this case is precisely the principle that demanded state preemption in the *NCUC* cases. * * * In *Computer II* the federal-state conflict would stem, as it did in the *NCUC* cases, from the practice of using CPE jointly for interstate and intrastate communication. The conflicting state policy, meant to affect only intrastate use, would unavoidably affect the federal policy adversely. Therefore, here, as in *NCUC I* and *II*, the state regulatory power must yield to the federal.
>
> In addition, the Act itself does not distinguish between authority over rates and authority over other aspects of communications. Section 2(a) and (b) of the Act allocate federal and state authority with regard to both "*charges* [and] . . . facilities." Therefore, conflicting federal and state regulations regarding dual use

CPE are no more acceptable under the Act when equipment rates are involved, as here, than when interconnection policies are involved, as in the *NCUC* cases.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

BRUCE E. FEIN
General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

JOHN E. INGLE
Deputy Associate General Counsel

MICHAEL DEUEL SULLIVAN
Counsel
Federal Communications Commission

APRIL 1983